

MAO (Migration) [2017] AATA 768 (26 April 2017)

DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Ms Socheata Mao
VISA APPLICANTS:	Mr Ty Bung Mr Leap Seang Bung Mr Pengan Bung Mr Leap Heng Bung
CASE NUMBER:	1612990
DIBP REFERENCE(S):	BCC2015/2937088
MEMBER:	David Barker
DATE:	26 April 2017
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa: • cl.300.211, cl.300.212, cl.300.213, cl.300.214, cl.300.215, cl.300.216 and cl.300.221 of Schedule 2 to the Regulations; and with the direction that the second, third and fourth named visa applicants meets the following criteria for a Subclass 300 (Prospective Marriage) visa: • cl.300.312 of Schedule 2 to the Regulations.

Statement made on 26 April 2017 at 10:10am

CATCHWORDS

Migration – Prospective Marriage (Temporary)(Class TO) visa – Subclass 300 (Prospective Marriage)
– Genuine and continuing relationship – Consideration of totality of evidence – Genuine intention to live together as spouses – Intends to be married

1. **LEGISLATION**

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, Schedule 2, r 1.15A, cl 300.211, cl 300.212, cl 300.213, cl 300.214, cl 300.215, cl 300.216, cl 300.221

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of decisions made by a delegate of the Minister for Immigration to refuse to grant the visa applicants Prospective Marriage (Temporary) (Class TO) visas under s.65 of the *Migration Act 1958* (the Act).
3. The visa applicants applied for the visas on 7 October 2015. At the time the visa application was lodged, Class TO contained only one subclass: Subclass 300 (Prospective Marriage). The criteria for a Subclass 300 visa are set out in Part 300 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria. Relevantly to this matter the primary criteria include c.300.216.
4. The delegate refused to grant the visas on 7 July 2016 on the basis that the first named visa applicant did not satisfy cl.300.216 of Schedule 2 to the Regulations because they were not satisfied that the evidence demonstrated the parties were or intended to be in a genuine and continuing relationship. The delegate was not satisfied at the parties genuinely intend to live together as spouses.
5. The review applicant appeared before the tribunal on 11 April 2017 to give evidence and present arguments. The tribunal also received oral evidence from the visas applicant. The tribunal hearing was conducted with the assistance of an interpreter in the Khmer (Kampuchean/Cambodian) and English languages.
6. The review applicant was represented in relation to the review by her registered migration agent, Mr Gary Howard
7. For the following reasons, the tribunal has concluded that the matter should be remitted for reconsideration.

8. BACKGROUND

9. The review applicant was born in Cambodia and is currently 48 years old. She first arrived in Australia in 1997 on a spouse visa and was granted Australian citizenship in December 1999. The review applicant was previously married to Mr Thou Chheun from 1996 to May 2000. There were no children from that union, however the review applicant has an Australian citizen child, Damien, born in October 2000.
10. The visa applicant is a citizen of Cambodia and is currently 43 years old. The visa applicant was previously married to Ms Nang Loem Chhiu. This marriage is reported to have ended in January 2011. There were three children from that union: Leap Heng Bung, born in 1999, Pengan Bung, born in 2001 and Leap Sean Bung, born 2004. These three children are secondary visa applicants on the basis of their claimed dependency on their father.
11. The parties claimed that they first met each other in Cambodia in December 2012. They next met in Cambodia when the review applicant returned there in June 2013. The parties held an engagement ceremony when the review applicant was again in Cambodia in June 2015. Following on this the visa applicant visited Australia in December 2015 and the review applicant has made further trips to Cambodia in May 2016 and December 2016.
12. The parties were interviewed by the department in Phnom Penh, Cambodia on 1 June 2016.

13. The delegate who considered the application noted the following issues:
- Whilst the party is opened a joint bank account in December 2015 no transactional evidence was provided regarding this account. When interviewed by the apartment the parties indicated they had not discussed at that stage any financial plans for their future;
 - When interviewed the review applicant appeared to provide a memorised response which suggested a level of preparation for interview and a lack of actual knowledge of the review applicant's living situation in Sydney, NSW;
 - Whilst the parties provided photographs of their engagement ceremony and various photographs in other social settings in Cambodia, the delegate was concerned that the sorts of photographs can be provided to strengthen a visa application, rather than as a genuine way of documenting a relationship;
 - The parties claim they met each other in 2012 when the review applicant was in Cambodia for her mother's funeral. They claim that I've kept in contact before getting engaged and 28 June 2015. It is noted that after meeting in 2012 the parties did not meet again until their engagement in 2015. The parties provided no evidence of the relationship, including evidence of communication, prior to 2015. The delegate gave no weight to the party's relationship development prior to 2015; and
 - The parties' discussion of their future plans was vague and lack any real consideration of long-term plans.
14. Based on these considerations, the delegate was not satisfied that the parties genuinely intended to live together as spouses and therefore did not meet the criteria in cl.300.216. The delegate found the visa applicant did not meet the criteria in cl.300.221. Accordingly, the application was refused.
15. The review applicant provided various documents to the tribunal in support of the application including the following:
- A written submission from Mr Howard,
 - Travel records;
 - Untranslated letters and post marked envelopes;
 - Photographs;
 - Bank records; and
 - Telephone records of the review applicant.
16. The parties gave their evidence in a reasonable and plausible manner.

CONSIDERATION OF CLAIMS AND EVIDENCE

17. The issue in the present case is whether the parties genuinely intend to live together as spouses and meet the other criteria for the grant of the visa.

INTENTION TO MARRY AN ELIGIBLE PERSON

18. Clause 300.211 requires that at the time of application the visa applicant intends to marry a person who is an Australian citizen or Australian permanent resident or an eligible New Zealand citizen.

19. The review applicant became an Australian citizen in December 1999. She has provided to the department copy of her certificate of Australian citizenship and Australian passport. The parties provided information, including arrangements made with a marriage celebrant, Ms Natalie Olive, to indicate that at the time of the application they intended to marry on 27 August 2016. Ms Olive states a Notice of Intention to Marriage remained valid until 27 March 2017. Accordingly, the requirements of cl.300.211 are met.

HAVE THE APPLICANTS MET IN PERSON AND ARE THEY KNOWN TO EACH OTHER PERSONALLY?

20. Clause 300.214 requires that the parties have met in person since each of them turned 18 and that they are known to each other personally.
21. The parties first met each other in December 2012 when the review applicant was visiting Cambodia. She has since returned to Cambodia on a number of occasions including in June 2015 when an engagement celebration was held. The visa applicant also visited the review applicant in Australia in December 2015. Photographs have been provided of the visa applicant and the review applicant together. Therefore, at the time of application, the requirements of cl.300.214 were met and this criterion continues to be met.

DO THE PARTIES GENUINELY INTEND TO MARRY?

22. Clause 300.215 requires that at the time of application the parties have a genuine intention to marry, and that the marriage is intended to take place within the visa period.
23. At the time of the application, the parties had held an engagement ceremony in Cambodia in June 2015. Photographs were provided to the tribunal of the parties' celebration. Arrangements had been made with a marriage celebrant in Australia for a marriage between the parties to take place on 27 August 2016. Those arrangements had to be cancelled as the application was refused.
24. The tribunal notes the marriage celebrant attested to a Notice of Intended Marriage, dated 27 September 2015, which says that the parties plan a marriage ceremony on 27 August 2016.
25. The parties still have plans to be married in Australia, however, have not made any bookings at this time as they wish to wait until a decision has been made in relation to the visa before committing to specific arrangements. On the basis of the evidence before it, the tribunal is satisfied the parties do intend to marry in Australia as soon as possible if the visa is granted.
26. At the time of application, the parties had a genuine intention to marry and satisfy the requirements of cl.300.215(a). The proposed date for the marriage was within the anticipated visa period as required by cl.300.215(b) and the parties planned to marry each other in Australia as soon as possible. Therefore, the requirements of cl.300.215 are met. The parties continue to genuinely intend to be married and, although no set arrangements have been made, the Tribunal finds that it is intended the marriage is to take place within the visa period.

DO THE PARTIES GENUINELY INTEND TO LIVE TOGETHER?

27. Clause 300.216 requires that at the time of application 'the parties genuinely intend to live together as spouses'. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where those two people are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is recognised as valid for the purposes of the Act; there must be a mutual commitment to a shared life as

husband and wife to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In considering an application for a Prospective Marriage (Temporary) (Class TO) visa, the tribunal may have regard to the considerations set out in r.1.15A(3) for spousal relationships: r.1.15A(4). Whilst it is not appropriate to consider whether the parties are spouses at the time of application or time of decision, an investigation of the parties' intentions with regard to the definition of spouse in legislation may assist in determining the parties' aspirations.

28. The tribunal has had regard to the considerations for a spousal relationship taking into account the degree to which these factors may be applied to determine a future intention.

29. *Development of relationship*

30. The review applicant told the tribunal that her first marriage was difficult. She said she raised her son, Damien, as a single mother and has at times struggled with loneliness and depression.
31. The review applicant said that she met the visa applicant in December 2012 when she was in Cambodia for the occasion of her mother's 83rd birthday. The visa applicant attended the birthday celebrations, as it provided an opportunity for them to meet. She said they had a mutual friend, who the review applicant knew from the Bonnyrigg, NSW Buddhist temple who suggested they meet. She said they did not start a close friendship at that time, but did after they reconnected when she returned to Cambodia in 2013 after her mother passed away.
32. The review applicant gave evidence the parties stayed in touch with each other by phone and internet. She said they made a commitment to a relationship in January 2015 and she travelled back to Cambodia for an engagement ceremony in June 2015. She said the visa applicant organised this event, which was attended by friends and members of both of their families.
33. The tribunal acknowledges the evidence from both parties that they plan to have a marriage ceremony and reception in Australia if the visa applicant is granted the visa. The party explained their wish to marry in Australia, rather than in Cambodia, is so more of the review applicant's friends in Australia can attend and participate in the marriage celebration.

34. *Nature of the household*

35. As the parties live in separate countries, it is not surprising that they have not been able to establish a household together.
36. The department's movement records show and the tribunal accepts that the review applicant has travelled to Cambodia on three occasions since they commenced a relationship with each other and the visa applicant has on one occasion travelled to Australia to spend time with the visa applicant, a few months after their engagement in 2015. The tribunal notes that this would appear to encompass more contact between the parties, since their engagement than was referred to by the delegate in their decision record.
37. The review applicant gave evidence she owns a four bedroom home in Wakeley, NSW and that the parties plan to live there with all of the children from their respective past relationships. The parties gave evidence the visa applicant will study to improve his English language skills and seek paid employment. The tribunal can see nothing implausible about this proposition.

38. After considering the available evidence about the household aspects of the parties' relationship and notwithstanding their living in different countries throughout their relationship, the tribunal gives some weight to this aspect of the relationship as an indicator the parties are in a genuine and continuing relationship.

39. *Financial aspects*

40. The Tribunal finds that there is documentary evidence that the visa applicant has provided some financial support for the review applicant, through funds he has deposited into a joint account with the ANZ Bank the parties established in December 2015. These funds amount to around \$3,060. The review applicant indicated she uses funds sent to her by the visa applicant for everyday expenses incurred by her son and herself but has no documentary evidence to corroborate this claim.
41. As the parties live in separate countries, there is little other to indicate the parties are pooling their financial resources, have any joint liabilities or are sharing their day-to-day household expenses and the tribunal gives little weight to this aspect of the relationship.

42. *Social aspects*

43. The tribunal has sighted a range of photographs of the parties in various social settings since 2012, including photographs with the three secondary visa applicants and the review applicant's son. The tribunal also sighted photographs of the parties with other adults and is satisfied these include members of their respective families and also friends.
44. The tribunal acknowledges that the son, cousin and one friend of the review applicant attended the engagement party in Cambodia. The tribunal accepts the evidence of the review applicant that her Cambodian relatives occupied two of the ten tables of guests at this event.
45. The tribunal has had regard to the oral evidence of Ms Chautha Chhin and Ms Ly Teang Seng during the hearing and has placed some weight upon it.
46. Ms Chhin stated she is a friend of the review applicant and accompanied her to Cambodia in 2015 for the parties' engagement ceremony. Ms Chhin said the review applicant frequently talks about her relationship with the visa applicant and of her hope he will be able to join her in Australia so she can have a less lonely life. Ms Chhin said she had contact with both the parties during the visa applicant's visit to Australia in later 2015 and gave her opinion that the parties have a genuine and supportive relationship.
47. Ms Teang stated she is a friend of the review applicant and distant relative of the visa applicant. She said she connected the parties together as she was aware they were both responsible single parents raising their children and experiencing loneliness in their personal lives. She said she thought their personalities would be compatible and as things have turned but she thinks she was correct in this view. Ms Teang gave her opinion the parties are in a genuine relationship.
48. After considering the currently available evidence, the tribunal is satisfied that parties have represented themselves to their friends and family as being in a genuine relationship and have the intention to live together with their children as a family. The tribunal has given significant weight to this aspect of their relationship.

49.

50.

51. *Nature of the commitment*

52. The review applicant told the tribunal her first marriage was difficult and she had a lonely life after the break down of her first marriage, as she was a single parent. She said this was something she and the visa applicant had in common, as he was bringing up the three sons from his first marriage as a single parent in Cambodia. The review applicant said the visa applicant has a calm demeanour and even when he is angry with one of his children, he talks to them in a rational way. She said this is a character trait she was drawn to in the visa applicant. She said he is also direct and honest in his interactions with her, which is something else that she appreciates.
53. The parties have set out their plans for their future together should the application be successful. They have provided details of where they would live, the manner in which they will care for their children in a blended family context and what work the visa applicant would seek to obtain in Australia.
54. The information provided by the parties support a finding that they provide the degree of companionship and emotional support to each other which would be expected in a genuine and continuing relationship. The parties' plans for their future together indicate they consider their relationship as a long term one.

55. *Assessment of the parties' relationship and intention to live together as spouses*

56. The tribunal finds that documentary evidence supports the parties' claims that they have had a friendship since 2013, which subsequently evolved into a committed relationship. The parties had an engagement ceremony in Cambodia in June 2015 which was attended by members of both parties' families. The review applicant has travelled to Cambodia on three occasions to specifically spend time with the visa applicant and he has travelled to Australia on one occasion to spend time with her.
57. There is documentary evidence of regular communication between the parties by telephone, however as the content of these phone conversations is unknown, the tribunal has placed limited weight on them. The tribunal has also placed no weight on post marked envelopes and untranslated documents, as the content of these documents and the envelopes is unclear.
58. The tribunal finds that the parties have discussed details of their future life in Australia and based on consistent oral evidence from the parties, the tribunal is satisfied that they draw emotional support from each other, and that each party considers their relationship to be a long term one. The tribunal has placed considerable weight on the commitment aspects of the parties' relationship. The tribunal is also satisfied the household and social aspects of the parties' relationship are consistent with two people in a genuine and continuing relationship. The cumulative weight given to these aspects of the parties' relationship outweigh the lack of weight the tribunal has given to the financial aspects of the parties' relationship.
59. The issue before the tribunal is whether, at the time of application in October 2015, the review applicant had a genuine intention to live with the visa applicant in a spousal relationship. Having carefully considered the totality of the evidence, and regard to the considerations set out in r.1.15A(3) for spousal relationships, the tribunal finds that at the time of application the parties did have genuine intention to live together as spouses, and therefore cl.300.216 is met.

60.

61. Do the parties continue to meet time of application requirements?

62. Clause 300.221 requires that at the time of decision, the visa applicant continues to satisfy the criteria in cl.300.211, 300.214, 300.215 and 300.216. That is, that visa applicant intends to marry an Australian citizen, permanent resident or eligible New Zealand citizen; that the parties have met and are known to each other personally; that the parties genuinely intend to marry and intend to do so during the visa period; and that the parties genuinely intend to live together as spouses.
63. Having considered the totality of the evidence, the tribunal is satisfied that the visa applicant continues to intend to marry the review applicant who is an Australian citizen and the parties continue to know each other personally, therefore the visa applicant continues to meet clauses 300.211 and 300.214. The tribunal finds that the visa applicant continues to satisfy clause 300.215. On the basis of all of the evidence, the tribunal is satisfied that the visa applicant and review applicant genuinely intend to live together as spouses at the time of decision, in that they intend to be validly married, with a mutual commitment to a shared life as husband and wife, that they intend to form a relationship which is genuine and continuing. Therefore, the visa applicant continues to satisfy clause 300.216.
64. Having considered the available evidence, the tribunal is satisfied that the applicant continues to satisfy the criteria in cl.300.211, cl.300.212, cl.300.213, 300.214, 300.215 and 300.216. Accordingly, the Tribunal finds that cl.300.221 is met.

65. Secondary visa applicants

66. The tribunal is satisfied on the basis of the application forms that the sponsorship referred to in cl.300.213 in respect of the person who satisfies the primary criteria includes sponsorship of the secondary visa applicants; Mr Leap Sean Bung, Mr Pangan Bung and Mr Leap Heng Bung. Accordingly, the tribunal finds that the secondary visa applicants meet cl.300.312.
67. Given the findings above, the appropriate course is to remit the application for the visas to the Minister to consider the remaining criteria for a Subclass 300 visa.

DECISION

68. The Tribunal remits the application for a Prospective Marriage (Temporary) (Class TO) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 300 (Prospective Marriage) visa:

- cl.300.211, cl.300.212, cl.300.213, cl.300.214, cl.300.215, cl.300.216 and cl.300.221 of Schedule 2 to the Regulations; and

with the direction that the second, third and fourth named visa applicants meet the following criteria for a Subclass 300 (Prospective Marriage) visa:

- cl.300.312 of Schedule 2 to the Regulations.

David Barker
Member